Supreme Court, U.S.
FILED
JUN 19 2006
OFFICE OF THE CLERK

No. 05-547

In The
Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE CENTER FOR COURT INNOVATION AND THE NEW YORK ASSOCIATION OF DRUG TREATMENT COURT PROFESSIONALS IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici submit this brief because they are concern
that adoption of Respondent's interpretation of the te
"drug trafficking crime" will render drug courts ineffecti
as a tool to combat drug use and drug-related crime
immigrant communities and will lead to the mandato
deportation of noncitizens who are successful graduates
drug court programs.

For nearly two decades, the criminal justice syst
has turned to drug courts to break the cycle of drug add
tion and drug-related crimes. Drug courts provide
alternative to punitive sanctions for drug possessi
offenders, offering regimented drug treatment in lieu
incarceration. By requiring factual admissions fr
defendants, drug courts are able to use the threat of j
and the promise of charge reduction or dismissal as
incentive to encourage treatment and retention.

Participation in drug courts affects citizens a
noncitizens differently. When a citizen participant h
successfully complied with treatment, factual admissio
about the underlying crime are expunged from his reco
However, even expunged drug court dispositions
classified as "convictions" for immigration purpos
Therefore, when a noncitizen successfully complies with
drug court program, he is still subject to deportation.
immigration judge may, however, consider a noncitize
participation in the program as a positive equity wh

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[1] Letters of consent have been filed with the Clerk pursuant
Rule 37.6. Amici state that no counsel for a party authored any par
the brief, and no person or entity other than amici and their cou
made a monetary contribution to the preparation or submission of
brief.

considering an application for discretionary relief. Thus, for a noncitizen, successful drug court compliance allows for the possibility of cancellation of removal.

If drug possession offenses are classified as aggravated felonies, noncitizens will be subject to mandatory deportation without discretionary review, regardless of their successful compliance with a drug court program.

Amici are organizations involved in providing training, technical assistance, and research to support the development of drug courts across the United States. Amici recognize that judicially supervised drug treatment offered through the courts has the power to change the behavior of drug offenders and improve public safety. Low rates of recidivism among the more than 150,000 drug court graduates are a powerful indication that society is best served by drug courts, which address the underlying drug abuse issues involved in non-violent drug possession offenses. Amici are troubled by the fact that Respondent's proposed interpretation of the "drug trafficking" aggravated felony ground would severely limit the states' ability to persuade noncitizen offenders to participate in drug court programs. Amici are concerned that such an expansive definition of the term "drug trafficking crime" would dramatically reduce drug courts' effectiveness in serving immigrant families and communities.

Amicus the **Center for Court Innovation** is a nonpartisan, non-profit entity dedicated to the spread of problem-solving justice on a national level. The organization performs research on problem-solving courts; conducts trainings to educate criminal and civil justice practitioners about the problem-solving model; and provides technical assistance to jurisdictions throughout the country on

strategies for implementing problem-solving initiatives. Since the Center's founding, it has been actively engaged in promoting the development of drug courts across the country.

Amicus the **New York Association of Drug Treatment Court Professionals** is the principal professional organization representing the interests of drug treatment courts in New York State. The multi-disciplinary membership includes judges, prosecutors, defense attorneys, treatment providers, probation staff and social workers. The Association seeks to enhance drug court program effectiveness by building capacity, offering training in evidence-based practices and forging partnerships among drug courts, public agencies and community based organizations.[2]

SUMMARY OF ARGUMENT

Drug courts, a much heralded development in the criminal justice field, depend on a "carrot and stick" approach to punish offenders and coerce drug treatment. The standard drug court procedure requires participants to plead guilty or admit facts sufficient for a conviction, but offers participants the chance to avoid a criminal conviction through full compliance with a drug treatment program.

[2] No judicial member of the New York Association of Drug Treatment Court Professionals participated in discussions about or the decision to file this brief.

Studies have shown that retention rates for drug court participants are significantly higher than retention rates for the general treatment population,[3] and have found lower recidivism rates among drug court participants than comparison groups composed of similar but non-participating defendants.[4]

Nonetheless, Respondent urges this Court to adopt a definition of "drug trafficking crime" that would undermine the effectiveness of drug courts by requiring the deportation of noncitizens who have successfully completed drug court programs.[5] If this Court follows Respondent's suggestion that any state felony drug possession must be classified as an "aggravated felony," a noncitizen

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[3] *See* AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND 'DO THEY WORK?' 4-5 (2005).

[4] *See* David B. Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, A Systematic Review of Drug Court Effects on Recidivism (2003) (unpublished manuscript, on file with the Center for Court Innovation) (finding that thirty-seven out of forty-two studies showed reductions in recidivism rates among drug court participants relative to non-drug court participants). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005) (finding recidivism reductions in the majority of programs studied); John Roman & Christine DeStefano, *Drug Court Effects and the Quality of Existing Evidence*, *in* JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE 107 (Jeffrey Butts & John Roman eds., 2004) (summarizing research on the effectiveness of drug courts in reducing recidivism, among other outcomes).

[5] Courts that have adopted Respondent's definition of aggravated felony have applied it retroactively. *See, e.g.*, *Salazar-Regino v. Trominski*, 415 F.3d 436, 448-49 (5th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3395 (U.S. Dec. 22, 2005) (No. 05-830) (upholding retroactive application of "drug trafficking" aggravated felony definition to state felony possession convictions).

who made the admissions necessary to participate in drug court will face mandatory deportation. This result follows from two basic facts: most drug courts focus on felony possession offenses, and the standard provisional pleas or stipulations required for participation in drug court programs are considered "convictions" for immigration purposes, even if they are later vacated or expunged pursuant to state law.[6] As a result, should this Court adopt Respondent's proposal to include in the term "drug trafficking crime" all state-level felony possession convictions, noncitizens who successfully complete drug treatment programs will be subject to mandatory deportation and mandatory bars to asylum, citizenship, and other forms of relief.[7]

Respondent's interpretation of the term "drug trafficking crime" will have the additional effect of discouraging noncitizens from participation in drug courts. If these noncitizens are precluded from receiving any discretionary relief from deportation, they will have less incentive to make the admissions required to participate in drug courts. Noncitizen offenders may choose to go to trial, which offers the chance of avoiding a conviction—and thereby avoiding an "aggravated felony" conviction for immigration purposes—rather than participate in drug courts, which will lead to mandatory deportation.

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[6] *See infra* text accompanying notes 39–41.

[7] In the Fifth Circuit, for example, felony possession deferred adjudication dispositions—like those resulting from participation in drug courts—are not convictions under Texas law, but are treated as aggravated felonies subjecting noncitizen drug court participants to mandatory deportation. *See Salazar-Regino*, 415 F.3d at 446–48.

By contrast, if this Court follows the approach of those circuits that do not treat a state felony drug possession conviction as an aggravated felony, noncitizen offenders who successfully complete a treatment program, conquer their substance abuse, and have their guilty plea vacated or expunged, may seek discretionary relief from the negative immigration consequences that follow a drug-related conviction.

The Court should therefore limit the term "drug trafficking crime" to offenses with a trafficking element in order to avoid undermining the ability of drug courts to address substance abuse and drug-related crime in immigrant communities.

BACKGROUND

Federal and state governments have recognized that drug courts provide an effective "carrot and stick" tool to rehabilitate drug possession offenders while at the same time reducing drug-related crime. The effectiveness of drug courts lies in their coercive power. Drug courts are designed to attain admissions of guilt from offenders prior to their participation. Those admissions of guilt provide the drug courts with important leverage: a participant who does not comply with the treatment program will face considerable punitive sanctions and will be sentenced for his original offense.

The success of drug courts led President George W. Bush to proclaim that:

> "[d]rug courts are an effective and cost efficient way to help non-violent drug offenders commit to a rigorous drug treatment program in lieu of

> prison. By leveraging the coercive power of the criminal justice system, drug courts can alter the behavior of non-violent, low-level drug offenders through a combination of judicial supervision, case management, mandatory drug testing, and treatment to ensure abstinence from drugs, and escalating sanctions."[8]

Drug courts represent a combined effort on the part of prosecutors, judges, defense attorneys, and federal and state governments to "break the cycle" of drug addiction and drug-related crime by using the threat of conviction to coerce drug court participants to comply with rehabilitation programs. Fueled by federal and state grants, the rapid expansion of drug courts across the country is indicative of a growing interest among state courts in innovative solutions to the problem of substance abuse and related criminal offenses.

A. Drug Courts Represent A "Carrot and Stick" Approach To Drug Possession Offenses, Leveraging The Coercive Power Of The Criminal Justice System To Ensure Successful Compliance

Drug courts are an innovative response to the failure of traditional criminal justice solutions to curb the

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[8] PRESIDENT GEORGE W. BUSH, A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA'S PRIORITIES 66 (2001). President William J. Clinton, who authorized the first federal funding for drug courts, similarly declared, "Three quarters of the growth in the number of federal prison inmates is due to drug crimes. Building new prisons will go only so far. Drug courts and mandatory testing and treatment are effective. I have seen drug courts work. I know they will make a difference." NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, 2006 DRUG COURT MONTH FIELD KIT 13 (2006).

incidence of crime[9] and drug use.[10] In order to reduce recidivism and improve public safety, federal and state governments have increasingly recognized the need for programs that confront the addiction underlying drug possession offenses. Drug courts, through the use of coercion-based treatment remedies which involve a negative sanction or penalty for non-compliance, are significantly more successful than treatment alone.[11] For this reason, local and federal officials have begun to endorse and encourage the development and expansion of drug courts. The drug courts that have emerged are the result of the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, treatment, mental health, social services, and child protection services to intervene and break the cycle of substance abuse, addiction, and crime.

The first drug court was established in Dade County, Florida in 1989.[12] Since then, drug courts have spread across the country. As of December 2004, there were a total of 1,621 drug courts in the United States and, as of

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[9] *See* Donald A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 400–04 (1990) (noting that, in the absence of additional treatment interventions, more than half of all offenders, on average, recidivate within three years of their release from incarceration).

[10] *See* Sally L. Satel, DRUG TREATMENT: THE CASE FOR COERCION 2, AM. ENTER. INST., STUD. IN SOC. WELFARE 2 (1999) (noting high relapse rates in treatment-only programs).

[11] *See* discussion *infra* Background Part B.

[12] *See* John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, *in* THE EARLY DRUG COURTS 19, 22 (W. Clinton Terry III ed., 1999) (offering an in-depth look at the origins of the first drug courts).

May 2005, another 478 in the planning stages.[13] From 2004 to 2005 there was a thirty-seven percent increase in the number of drug courts nationwide.[14] New York State now has 164 drug courts with more being planned.[15] And, since the state implemented its first drug court in 1995, in New York alone 12,472 offenders have graduated from drug courts, with 7,233 offenders currently participating.[16]

Though the scope and nature of drug courts varies from state to state, all reflect recognition that the coercive leverage of the criminal justice system can be a powerful tool to combat substance abuse. All drug courts share certain common elements.[17] Most drug courts require an admission of guilt before a participant enters the program. Successful participants are offered a legal incentive for completion of the program, including vacatur of a plea and dismissal of charges, reduction of a felony to a misdemeanor, or favorable discharge from a probation term.

Before participating in a drug court program, defendants are screened for eligibility based on their criminal history, eligibility for drug treatment, and current case information.[18] Participation in drug court programs is

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[13] C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 2 (2005).

[14] *Id.* at 3.

[15] CHIEF JUDGE JUDITH S. KAYE, NEW YORK STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 15 (2006).

[16] OFFICE OF COURT DRUG TREATMENT PROGRAMS, NEW YORK STATE UNIFIED COURT SYSTEM, PROJECT MANAGER'S STATUS REPORT (2006).

[17] *See* NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997).

[18] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 37–38.

generally limited to U.S. citizens and immigrants with legal status.[19] In addition, most drug court programs are reserved for defendants charged with drug possession or other nonviolent offenses.[20] A few drug courts extend eligibility to defendants charged with minor drug sales if the court determines that the seller was motivated by drug addiction.[21] Most drug court programs, however, are not accessible to defendants charged with drug trafficking crimes.[22] A defendant with a past or pending charge of distribution of a controlled substance, for example, is automatically denied access to the Utah drug courts;[23] the Harris County, Texas drug court excludes any defendant who has a pending charge for delivery of a controlled

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[19] Programs may require direct proof of status. They may also require proof of ability to arrange for payment for treatment, which typically involves Medicaid coverage. Medicaid coverage is limited to "qualified aliens" with legal status. *See* 8 U.S.C. §§ 1611, 1621.

[20] Any drug court program that allows participation by either current or past violent offenders cannot receive federal grants administered under the 21st Century Department of Justice Appropriations Authorization Act. 42 U.S.C. § 3797u(a)(1). *See* 42 U.S.C. § 3797u-2 (defining "violent offender.").

[21] Some drug courts, such as New York City's, primarily serve individuals arrested in street-level sales involving small amounts of controlled substances. *See* MICHAEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 33, tbl. 3.2 (2003). The District Attorney scrutinizes drug sale cases carefully to ensure that the sale did not involve suspected heavy trafficking or involvement in an illegal commercial operation, and did not take place near school property. *Id.* at 14.

[22] *See* STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, Pub. No. NCJ-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 5 (1993) (noting that many drug courts handle only drug possession cases).

[23] Utah Drug Courts, http://www.utcourts.gov/drugcourts/#Eligible (last visited June 11, 2006).

substance;[24] the Gwinnett County drug court in Georgia excludes defendants when it is determined that he or she acted with an intent to sell or distribute drugs;[25] the Lane County, Oregon drug court excludes any defendant alleged by the District Attorney to be a drug dealer;[26] and the Ada County, Idaho drug court only accepts defendants charged with felony possession of a controlled substance or charged with a drug related property crime.[27]

This differentiation between possession and trafficking crimes is an important component of drug courts and reflects a jurisdiction's judgment about the appropriate punitive sanctions required for various offenses. For example, in a report commissioned by Chief Judge Judith S. Kaye and chaired by Robert B. Fiske, Jr. on the impact of drug cases on New York State courts, the commission recommended increasing the number of New York drug courts but from the outset drew a distinction between drug crimes committed by drug traffickers in the business of selling drugs for a profit, and cases involving nonviolent drug addicts whose drug and drug-related crime was motivated by their addiction. The Commission concluded that drug trafficking crimes "should continue

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[24] Harris County, TX Drug Court Criteria, http://www.justex.net/Drug%20court/Information/Drug%20Court%20Eligibility.pdf (last visited June 11, 2006) (describing eligibility criteria for the STAR adult drug court in Harris County, Texas).

[25] Gwinnett County, GA Drug Court, http://www.co.gwinnett.ga.us (last visited June 11, 2006).

[26] Lane County, OR Drug Court http://www.ojd.state.or.us/lan/drugcrt/index.htm (last visited June 11, 2006).

[27] Ada County Drug Court, http://www.adaweb.net/departments/prosecutor/DrugCourt.asp (last visited June 11, 2006).

to be prosecuted vigorously" and should not be eligible for admittance in drug treatment courts.[28]

B. Drug Courts, Many Supported By Federal Funding, Are Effective At Improving Public Safety And Reducing Recidivism Among Drug Possession Offenders

Proclaimed by the Director of the White House Office of National Drug Control Policy to be "[o]ne of the most significant criminal justice initiatives in the past twenty years,"[29] drug courts are a rare criminal justice intervention that demonstrates success at reducing recidivism rates among participants.

In 2005, the U.S. Government Accountability Office conducted a comprehensive survey of the effectiveness of drug courts and found evidence of consistent recidivism reductions.[30] A series of other recent evaluations have also concluded that drug courts reduce recidivism.[31] For example, a multi-site study by the Center for Court Innovation found that drug courts in New York State generated significant recidivism reduction over a three-year post-arrest period compared with similar non-participating

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[28] NEW YORK STATE COMMISSION ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO JUDGE JUDITH S. KAYE 5 (2000).

[29] John P. Walters, *Drug Courts Save Money and Get Better Results*, SAN JOSE MERCURY-NEWS, May 11, 2005, *available at* http://www.whitehousedrugpolicy.gov/news/oped05/051105.html.

[30] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4.

[31] *See supra* note 4 and accompanying text.

defendants.[32] Those who graduated from drug court were far less likely to recidivate: the study found a 71% reduction in recidivism for drug court graduates.[33]

The success of drug courts is in large part attributable to the role of coercion in inducing defendants to participate in substance abuse treatment for meaningful periods of time. Whereas residential treatment facilities have one-year retention rates ranging from only 10 to 30%, drug courts nationally retain an average of 60% of their participants after one year.[34] Though the drug court movement initially developed with only state-level support,[35] the federal government quickly recognized its importance. In 1994, Congress passed the Violent Crime Control and Law

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[32] REMPEL ET AL., *supra* note 21, at x (reporting a 29% recidivism reduction over a three-year post-arrest period and an average 32% reduction over a one-year post-program period when compared with cases processed in conventional courts). *See also* Denise C. Gottfredson, Brook W. Kearley & Stacy S. Najaka, *Effectiveness of Drug Treatment Courts: Evidence From a Randomized Trial*, 2 CRIMINOLOGY AND PUB. POL'Y 171 (2003) (detecting significant reductions in recidivism over a two-year measurement period as a result of participation in the Baltimore City Treatment Court); Denise C. Gottfredson, Brook W. Kearley, Stacy S. Najaka & Carlos M. Rocha, *Baltimore City Drug Treatment Court: 3-Year Self-Report Outcome Study*, 29 EVAL. REV. 42 (2005) (three-year follow-up report).

[33] REMPEL ET AL., *supra* note 21, at xi.

[34] Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT. DRUG COURT INST. REV. 1, 30–31 (1998).

[35] *See* Goldkamp, *supra* note 12, at 4–5 (noting that most of the early drug courts did not receive federal funding); W. Clinton Terry, III, *Judicial Change and Dedicated Treatment Courts*, *in* THE EARLY DRUG COURTS, *supra* note 12, at 1, 9 (stating that "[s]ome of the early courts were entirely local in creation and funding.").

Enforcement Act,[36] calling for federal support for planning, implementing, and enhancing drug courts for nonviolent drug offenders. The U.S. Department of Justice's Bureau of Justice Assistance (BJA) Drug Court Discretionary Grant Program supports statewide drug court implementation and enhancement. In his 2007 budget, President Bush provided for $69 million to fund drug courts.[37]

Judicially-supervised drug treatment for drug possession offenders has received support from prosecutors, judges, defense attorneys, and federal and state governments.[38] With the support of the federal government, what began as a unique innovation in Miami has now spread to every state in the country.

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[36] Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

[37] BUDGET OF THE UNITED STATES GOVERNMENT 2007, 169. President Bush also requested more than seventy million dollars for drug courts for fiscal year 2006. BUDGET OF THE UNITED STATES GOVERNMENT 2006, 704, 706.

[38] *See* U.S. GOVERNMENT ACCOUNTING OFFICE, BRIEFING REPORT: DRUG COURTS: INFORMATION ON A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME 15 (1995) (noting that drug courts require "a special collaborative effort among judges, prosecutors, defense attorneys, and related criminal justice agencies along with treatment providers and other social services and community organizations").

ARGUMENT

Expansion of the Term "Drug Trafficking Crime" to Include Non-trafficking Offenses Undermines Drug Courts' Ability to Serve Noncitizen Drug Possession Offenders And Will Lead To The Deportation Of Noncitizens Who Have Overcome Addiction Through Participation in Drug Courts

Respondent's interpretation of the term "drug trafficking crime" to include felony drug possession offenses threatens to undermine drug courts as an effective and cost-efficient means to address drug use by noncitizens and to positively impact immigrant families and communities. Respondent would require the deportation of successful graduates of drug court programs and undermine the incentive for noncitizens to participate in these programs.

A. Under Respondent's Proposed Rule, Immigration Judges Will Be Prohibited From Granting Relief To Noncitizens Who Have Successfully Completed Drug Treatment Programs

Virtually all noncitizens who participate successfully in drug court programs are deportable. The critical issue is whether the aggravated felony definition is read so broadly as to deny all noncitizen drug court participants any possibility of discretionary relief from deportation. Under Respondent's broad reading of the aggravated felony definition, immigration judges will be prohibited from granting relief to noncitizens who have successfully completed drug court programs.

For immigration purposes, a "conviction" is defined broadly as "a formal judgment of guilt of the alien entered

by a court" or, "if adjudication of guilt has been withheld, where:

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[39]

Under this definition, courts have interpreted the provisional pleas often required for drug court participation, as binding convictions. Even in instances where a guilty plea was expunged or where formal adjudication was postponed pending the successful completion of a period of probation, as is the case with drug courts, the rule of the Board of Immigration Appeals, followed by all but one of the circuits that have addressed the issue, is that noncitizens are deemed to have been "convicted" for immigration purposes.[40]

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[39] 8 U.S.C. § 1101(a)(48)(A).

[40] *See, e.g., Acosta v. Ashcroft*, 341 F.3d 218, 225–26 (3d Cir. 2003) (following the "BIA's present interpretation of Section 101(a)(48)(A) . . . that state law charges of simple possession of a controlled substance that have been dismissed are a conviction for purposes of the INA"); *U.S. v. Anderson*, 328 F.3d 1326, 1328 (11th Cir. 2003) (holding that a plea of nolo contendere with adjudication withheld was a conviction within the meaning of Section 101(a)(48)(A)); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812 (5th Cir. 2002), *amended by* 23 U.S. App. LEXIS 3629 (2003) (holding that a vacated federal conviction remains valid for immigration purposes); *U.S. v. Zamudio*, 314 F.3d 517, 521–22 (10th Cir. 2002) (holding that a "plea in abeyance," which required the defendant to pay a $1,000 fine over a six-month period, was a conviction within the meaning of Section 101(a)(48)(A)); *Herrera-Inirio v. INS*, 208 F.3d 299, 304 (1st Cir. 2000) (holding that a noncitizen's guilty plea and

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In addition to having a "conviction" for immigration purposes, noncitizens who complete drug court programs are deportable under the broad deportability grounds for drug offenses.[41] The question presented in this case is whether noncitizen drug possession offenders are also subject to being classified as having an "aggravated felony" conviction.

Congress has lessened the dramatic impact of the broad drug deportability grounds and the expansive definition of a "conviction" by allowing immigration judges to find that certain noncitizens with convictions are eligible for cancellation of removal, asylum, or other waivers if they can prove sufficient positive equities or threat of persecution upon deportation.[42] Noncitizen drug offenders therefore have a strong incentive to complete

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completion of probation, followed by a judgment of exoneration, was a conviction within the meaning of Section 101(a)(48)(A)); *U.S. v. Campbell*, 167 F.3d 94, 98 (2d Cir. 1999) (holding that a conviction for possession of a controlled substance, vacated after service of probation, was a conviction within the meaning of Section 101(a)(48)(A)). *Cf. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that noncitizen first-time simple drug possession offenders who were no longer deemed to have been "convicted" under state law because they had complied with state rehabilitative statutes were not subject to deportation for those offenses because their offenses would have qualified for treatment under the Federal First Offender Act).

[41] 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."). *See also* 8 U.S.C. § 1227(a)(2)B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[42] *See* 8 U.S.C. § 1229b(a) (listing requirements for cancellation of removal); 8 U.S.C. § 1158 (listing requirements for asylum claims); 8 U.S.C. § 1182(h) (listing requirements for family hardship waivers).

drug treatment. Beyond avoiding a felony conviction, noncitizens' successful completion of rehabilitation programs leaves open the possibility of obtaining discretionary relief by showing an immigration judge that they have overcome their addictions and deserve to remain in the United States with their families. Under Respondent's interpretation drug court dispositions—like all felony possession convictions—would become aggravated felonies, and noncitizens who have successfully completed drug court programs would be subject to mandatory deportation with no possibility of discretionary relief.

Furthermore, including possession offenses—and therefore drug court dispositions—in the definition of "drug trafficking crime" would lead to the denial of naturalization and mandatory deportation for noncitizens who have already successfully completed drug court programs. The application for naturalization requires applicants to state whether they have ever been "placed in an alternative sentencing or rehabilitative program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication)."[43] This question elicits information about dispositions such as those provided by drug courts. If this Court adopts Respondent's interpretation of the aggravated felony definition, longtime legal permanent residents, including veterans and those with U.S. citizen family members, who have successfully completed drug treatment will face not only automatic denial of their citizenship application but will also be subject to referral

[43] United States Citizenship and Immigration Services, Department of Homeland Security, N-400 Application for Naturalization (2005), *available at* http://www.uscis.gov/graphics/formsfee/forms/files/N-400.pdf.

for mandatory deportation. Respondent would bind the hands of immigration judges, mandating that noncitizens who have overcome their addictions as a result of drug treatment courts be deported.

Consider an example of a lawful permanent resident living in Texas.[44] This individual has lawfully resided in the United States for more than two decades and has a U.S. citizen wife and child. In 1993, when he was nineteen-years-old, he was charged with his first and only offense: felony possession of marijuana. Instead of prosecuting him in criminal court, as a condition of his bond he was sent to drug court where he made factual admissions and was assigned to a one-year drug treatment program. Indictment, conviction, and formal adjudication were deferred and, upon his successful completion of the program, the charges were dropped. As a result of his participation in the program, this individual has remained drug free for over twelve years.

Under Texas's interpretation of the aggravated felony rule, and under the rule argued for by Respondent, this individual would be classified as an aggravated felon and would be subject to mandatory deportation. An immigration judge hearing the case would be prohibited from considering positive equities such as the length of the individual's time in the United States, the hardship that his departure would cause his U.S. citizen family members, and the fact that the predicate charges were dropped upon his successful completion of the drug treatment program. If the Court adopts Respondent's proposed

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[44] This example is a composite that is representative of those who are affected by a broad reading of the aggravated felony definition.

definition of the term "drug trafficking crime," which includes state-level possession offenses, both past and present noncitizen participants in drug courts who have been granted similar conditional discharges will be subject to mandatory deportation.

B. Adoption Of Respondent's Interpretation Of The Term "Drug Trafficking Crime" Will Render Drug Courts Ineffective As A Tool To Address Noncitizen Drug Use and Drug-Related Crime, Thereby Negatively Impacting Children, Families, And Communities

By making it difficult, if not impossible, for drug courts to serve noncitizen offenders, Respondent's interpretation of the aggravated felony definition would conflict with federal policy supporting the use of drug courts. Drug courts currently offer both citizens and noncitizens a "carrot" (a vacated, expunged, or reduced conviction) and a "stick" (jail time or other punishment, and a conviction on one's record) to motivate compliance with drug treatment and avoidance of criminal behavior. For noncitizens, Respondent's definition of "drug trafficking crime" removes the "carrot" of eligibility for discretionary relief from deportation, leaving only the "stick" of punishment. If noncitizens participate in drug court programs, they will be subject to mandatory deportation, regardless of whether they succeed or fail in drug treatment. Given the federal government's ongoing support for drug courts as "an effective and cost efficient way to help non-violent drug offenders,"[45] and the widespread recognition that

[45] PRESIDENT GEORGE W. BUSH, *supra* note 8, at 66 (2001).

court-supervised drug rehabilitation improves public safety, this Court should avoid an interpretation of the term "drug trafficking crime" that reduces drug courts' ability to serve noncitizen communities.

A central component for drug courts' success is their ability to wield the coercive power of the criminal justice system. Drug possession offenders are offered a series of incentives to comply with the program's requirements. Successful noncitizen drug court participants emerge from the programs rehabilitated, they are able to avoid jail time and remain with their family, they may build positive equities to fight deportation, and they avoid a felony conviction on their criminal records. If drug possession is considered an aggravated felony, then the coercive incentive system that ensures drug courts' effectiveness is dramatically undermined. Regardless of their successful completion of a drug court program, their rehabilitation, or the fact that there is no criminal law felony conviction on their record, noncitizens who participate in drug courts will be subject to mandatory deportation. There is no opportunity to retain family unity; an immigration judge is prohibited from granting discretionary relief and considering positive equities.

Drug courts provide a valuable rehabilitative service to participants, their communities, and their families. Currently, drug courts regularly open their doors to lawful permanent residents charged with drug possession offenses. Like other graduates of drug court programs, many of these people manage to overcome their addictions and lead sober, law-abiding lives. Provided that over five years have passed since the offense, noncitizens who successfully complete drug court programs may be granted U.S. citizenship. Under Respondent's interpretation, however,

legal permanent residents with drug court dispositions who apply for citizenship will not only be rendered permanently ineligible to naturalize, they will also face referral for mandatory deportation when they state on their application that they have received a non-conviction court disposition for a drug offense.

Because the effects of drug addiction reach beyond individual drug users, drug courts are an important means by which the criminal justice system can benefit the families and communities of noncitizen drug offenders as well. By promoting sobriety and law-abiding behavior, drug courts have the potential to strengthen families and make a profound impact on the health of our society as a whole. Nearly two-thirds of drug court participants are parents.[46] Many noncitizen drug offenders have U.S. citizen children and/or spouses whose lives are immeasurably changed for the better when their noncitizen family member completes drug treatment and overcomes his substance abuse problem. Drug courts provide a strong incentive for noncitizens with substance abuse issues to complete a rigorous rehabilitation program, and therefore serve the interests of U.S. citizen children and other family members affected by addiction as well as reducing pressure on the child welfare and family court systems.

By turning felony drug court dispositions into aggravated felonies, Respondent's overly broad interpretation of the term "drug trafficking crime" threatens to undermine not only drug courts' positive impact on individual

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[46] DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS 8 (1998).

noncitizen drug possession offenders, but upon their families and communities as well. The participation of noncitizen drug court participants will decrease and legal permanent residents who completed drug court programs years ago will be subject to mandatory deportation. In addition to removing the coercive incentive system central to drug courts' success, mandatory deportation of those with felony drug court dispositions will result in fear of participation in drug courts in immigrant communities, making it even more difficult for drug courts to serve as a tool to address substance abuse issues in those communities. Expansion of the term "drug trafficking crime" to include non-trafficking possession offenses will therefore dramatically curtail the ability of state criminal justice systems to channel noncitizen offenders into treatment programs and will unfairly punish noncitizens who have successfully completed drug treatment and now lead healthy, stable lives.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision from the United States Courts of Appeals from the Eighth Circuit be reversed.

Respectfully submitted,

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June 2006